INCREASE OF FEDERAL POWER UNDER THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION

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Any discussion of a subject of so much interest and importance as that which has been assigned to me by the courtesy of the Association, within the limit of time allowed, must necessarily be exceedingly condensed, and more or less partial and superficial.

It is doubtful whether 12 words have ever been written in any law which have been fraught with more momentous consequences, than those found in Section 8 of Article I of the Constitution of our country which declare that:

"The Congress shall have power . . . to regulate commerce among the several States."

Among the causes which led up to the formation of the Constitution and the establishment of the Federal government under it, the following may be mentioned as the most potential:

1. The impotency of the Confederacy to protect international and interstate commerce, and navigation over the high seas, and upon the navigable waters of the several States.
2. The insolvency of the Confederacy because of its abject dependence upon the States for its revenues.
3. The injury to the States from the abuse by some of them of the power to tax and control interstate traffic.
4. The imbecility of the Confederacy in respect to the protection of the States against the injurious or hostile acts of foreign nations, and from domestic violence.

A study of the history of the times will show that among these causes, the first (the protection and promotion of international and interstate navigation and commerce) was not the least influential; but such study will also demonstrate that the control of commerce or trade *within* the States was never once considered as a possible attribute of the general government. The regulation of *overland* traffic *between* the States, received little, if any, attention from the

makers of the Constitution, and there never was any idea among the framers of that instrument that Congress or any other Federal authority would ever have any control whatever over the internal traffic and other domestic affairs of the people of the States.

An examination of the debates in the Federal and State Conventions of 1787 and 1788, and of contemporary discussions in the several States, will show that the Constitution would have absolutely failed of requisite support had it been supposed that it conferred any such powers on Congress, or on any other department of the general government.

On the other hand, the desire and purpose that the general government should be clothed with plenary and exclusive power to regulate all intercourse with foreign countries, was practically unanimous.

Commerce over the seas had been paralyzed for the want of such protection and regulation as could only be secured through the agency of some general and paramount authority clothed with exclusive power to control all intercourse between foreign nations and the several States.

The long struggle of the Colonies against the arbitrary rule of the British Crown and Parliament over their affairs, a struggle which had begun in Virginia in the second decade after the settlement at Jamestown, and which with varying fortunes, had continued in this and other Colonies, until it culminated in the Revolution, had had but one dominant purpose.

That purpose was to win for the people of each of those separate Colonies the priceless boon of local self government.

That contest was not begun or continued through more than 150 years in order that a consolidated government by all of the Colonies over the people of each Colony, should take the place of the domination of the British Crown.

No, the one motive of that long struggle was that the people of Massachusetts should govern the people of Massachusetts, that the people of New York should govern the people of New York, the people of Virginia should govern the people of Virginia, and so on as to the other Colonies.

There is nothing in human history which can be predicated with greater confidence in its truth, than the proposition that the American Revolution would never have been begun, or if begun would have speedily ended in disaster, had the people of the several Colonies believed that, if they succeeded in throwing off British domination,

there would be established over them in its place the supreme control of a centralized government made up by the consolidation of all the States.

No men have ever lived who had a more just or more accurate conception of the truth, that local self government is of the very essence of liberty, than the men who led and guided those Colonies during all that formative period of our history.

With a few conspicuous exceptions, like Alexander Hamilton, they accepted the truth which history had taught, that a centralized government with supreme control over the affairs of the people of the vast territory which it was the inevitable destiny of these States to dominate, whether such government should be, in form, a consolidated republic or not, would necessarily, constituted as human nature is, develop into a consolidated despotism over the population subject to its sway.

From the beginning to the close of the Revolution, and long after the Colonies had been recognized as free, sovereign, and independent States, the principle of segregation of sovereignty and of supreme governmental powers, instead of the consolidation of those powers in a central government, generally dominated the popular mind and heart, from New Hampshire to Georgia.

Under the potential leadership of Washington, supported by Hamilton, Madison, James Wilson, Edmund Randolph, John Adams, and others of the leading statesmen of the Revolution, a common peril brought about a change; but a change with essential limitation, and one which it was never designed should result in the overthrow of local self government.

The course of events after the Colonies had become independent States, demonstrated to the architects of the American Republic, that unless a government could be established which would deal directly with the individual citizen, without the interposition of the States as intermediaries, as to matters of general concern to all the States,—a government clothed with supreme authority as to all matters involving relations with foreign powers, and with power to secure peace abroad and tranquillity at home, should be established, then the lately enfranchised States would inevitably become the victims of commercial antagonisms between themselves, and would ultimately lose the liberties which they had wrested from the grasp of the British King.

And so the Constitution of 1788 was a compromise of divergent and

conflicting views, and a resultant from the logic of inexorable conditions.

While its great purpose was to create a government national and supreme as to all of the relations of the States with foreign powers, and as to all matters of general concern to all of the States, it was equally its supreme purpose and effect to leave with the States, sovereignty and supreme control over all matters of local concern, and over all of their domestic affairs, with only such limitations upon those powers as were deemed just and proper in regard to subjects which equally affected the well-being of the people of all the States, such as the prohibition of bills of attainder, *ex post facto* laws, and of laws impairing the obligation of contracts.

Nevertheless, the powers delegated to the general government were complex in character, vast in importance, and greater in their scope and in their extent than could be well and efficiently exercised by its several departments, however ably they might be manned.

As was pointed out by Mr. Webster in his argument in the great case of Gibbons vs. Ogden, the first case adjudicated by the Supreme Court which involved the Commerce Clause of the Constitution, the Constitution contains an *enumeration* and not a *definition* of the powers delegated to Congress.

This necessarily devolved upon the Courts, and ultimately upon the Supreme Court, the function of defining each grant of power.

It is evident that in order to ascertain the character and scope of the powers conferred upon Congress by the Commerce Clause, it was essential to define what was embraced by the word "Commerce" within the meaning of that provision of the Constitution, and to determine the extent to which Congress was granted control over that subject.

It is manifest that this presented a subject of very great moment, and opened up a wide field of discussion and adjudication for the consideration of the Court.

The main question, and questions cognate to it, have occupied the attention of the State and Federal Courts of last resort in hundreds of cases since Gibbons vs. Ogden, decided in 1824, down to the present year.

No cases have arisen, the decision of which involved the exercise of a wider discretion, or the adjudication of questions of greater importance, by the Supreme Court.

There was room for wide difference of opinion as to the import of the word "Commerce."

It might have been plausibly contended that, in its broadest sense, commerce embraces all of the business transactions and intercourse between man and man. It would thus include not only traffic, commercial intercourse, and transportation, but all business communications, and every species of contract; and if the regulation of commerce carried with it also the regulation of the means and agencies of commerce, the grant would also embrace the regulation of interstate railways, telegraph and telephone lines, and of the great lines and modes of communication, and business dealings among the citizens of the different States; and if, as has been contended (and as has been decided by the Courts to be true with certain qualifications and under certain conditions) the grant was *exclusive*, it will be apparent that the subjects which this clause would take out of the jurisdiction of the States and transfer to the jurisdiction of the Federal Courts, would be of immense importance and extent, and of almost infinite complexity and variety. Indeed, thus interpreted, it would leave little or nothing to the jurisdiction of the State in reference to transactions between their own citizens and citizens of other States.

Fortunately, not only for the State, but for the Federal governments, the Supreme Court of the United States, the final arbiter of those questions, has given a less comprehensive interpretation to the word "Commerce" than might have been assigned to it.

Following the reasoning of the great Chief Justice in Gibbons vs. Ogden, and Brown vs. State of Maryland, that Court has pretty well fixed the limitations of this power and confined it to the regulation of interstate *commercial* intercourse, traffic, navigation, and transportation, and of commercial lines of transmission, such as interstate telegraph lines, assimilating the meaning of the word "Commerce" as nearly as could be ascertained, to the meaning and sense in which it was understood and used by the framers of the Constitution.

Thus interpreted, it excludes insurance contracts, contracts of sale and barter, and for the lending of money, and a great mass of other transactions, which, though in a sense commercial contracts, were not considered to be within the meaning of the word "Commerce" as used in the Constitution.

Nevertheless, interpreted as the clause has been by the Supreme Court, it has clothed the Federal Government with a scope and character of jurisdiction over affairs permeating the different States, of the greatest importance to them, which it cannot be supposed

that the framers of the Constitution could ever have intended to be embraced in this grant of power.

This has resulted in large measure from the marvelous change in the modes of transportation and of communication which have been discovered and introduced since the Constitution was written, the nature and effect of which the makers of that instrument could not by possibility have anticipated.

The only means of communication by water of which they knew anything, was by vessels propelled by wind, by poles, or by oars.

The only over-land means of communication known to them, was by wagons, or other vehicles, or pack-horses over turnpikes and roads.

Such turnpikes and roads do not seem, from the language of Chief Justice Marshall in Gibbons vs. Ogden, to have been embraced within the Commerce Clause as interpreted by him. At all events, their regulation was, according to his view, undoubtedly left with the States.

The marvelous growth in the population, industrial activities, products and traffic of the country, brought about in large measure by the introduction of steam and electricity as agencies of communication and transportation, have built up enormous interests, which, while they deeply concern, and are intimately wrapped up with, the affairs of the people of the several States, have also such interstate relations that the Courts have felt constrained to consider them as being parts of commerce among the States, and subject to congressional regulation.

This has necessarily resulted in the enormous enhancement of Federal power.

Much has been said of what, by way of criticism of the Courts, has been sometimes termed "Court made law." Such criticism is just whenever the Courts, departing from their legitimate functions, undertake by construction to change the intendment and meaning of statutory or fundamental enactments; but when the Courts in the discharge of the legitimate judicial function of interpretation, undertake to fairly and conscientiously construe the terms of statutes, or of Constitutions, as has been uniformly true of the Supreme Court of the United States in its dealings with the Commerce Clause, any such criticism would be unwarranted.

Fortunately, one question has been, it is to be hoped, in large part conclusively determined and put at rest by the adjudications of the

Federal Courts, namely, what are the limitations of the powers of the Federal and the State governments respectively over commerce? It may be fairly concluded from these decisions, that Federal regulation is confined to that commerce, and to those facilities and modes of communication which concern the people of two or more States, and which the National government can more efficiently regulate, because the operation of its statutes is not limited to State lines; and that the jurisdiction of the States embraces that commerce, and those facilities and means of communication, which lie wholly within the State, and more immediately concern its people, and which the State can more efficiently regulate, because their situs is within the territorial jurisdiction of the State, and because they are susceptible of more efficient regulation by local authorities.

Although from the operation of causes such as have been suggested the Commerce Clause vastly increased the jurisdiction and the powers of the Federal government far beyond any conception or dream which could have entered the minds of the makers of the Constitution, it must be said that, by reason of the conscientious and, in a great majority of its adjudications upon these and cognate questions, the generally conservative and wise exercise of judicial power by the Supreme Court of the United States, much has been done to safeguard the rights, liberties, and essential governmental powers of the States, and of the people of the States, and to prevent the National government from being changed from a Federal Republic into a consolidated Empire.

There is a subject in some of its aspects so related to that which I have here imperfectly outlined, that it may be properly mentioned in this connection.

It is a subject which challenges the most earnest consideration of thoughtful and patriotic men.

It is the interference with, and direct or indirect regulation of, commerce within the States by the United States Courts. This Federal jurisdiction to which I now refer, has been deduced, not from "the Commerce Clause," but from the 14th Amendment.

Under the construction and effect given to that Amendment, the powers of the Federal government—particularly of the Federal judiciary—have been extended over the internal affairs of the States, and particularly over commerce wholly within the States, to an extent which threatens the safety, the governmental rights, and the well being of the States.

It is more the manner in which this Federal jurisdiction is exercised than the fact that the jurisdiction is asserted, which is the occasion of just complaint.

It is the interference by the subordinate Judges and Courts of the United States by summary injunction with the acts and proceedings of the duly constituted legislative, executive, and judicial bodies of the States as to matters of public concern entirely within the States.

This power, as reposed in these subordinate Courts, is likely to be and is undoubtedly abused, to the wrong and injury of the people of the States, producing friction and antagonisms, and sometimes engendering a rankling sense of injustice and wrong.

Upon an *ex parte* statement of facts made in a bill, supported by a general affidavit, and generally by other *ex parte* affidavits, the laws enacted by State legislatures, and the carefully considered orders and judgments of railroad and corporation commissions, which may be entered after exhaustive judicial investigations, trials, and consideration, are held up by the order of a Judge who, however learned and able and upright, is still not infallible; and the State is compelled, either to passively submit, or else, under unequal conditions, to engage in enormously expensive litigation with powerful litigants, represented by a staff of the ablest counsel in the country, and supported by technical and expert witnesses, who however upright, are generally warm partisans of the litigants by whom they are employed.

Of course, the transportation companies and others whose rights under the State or National Constitutions have been, or are considered by them to have been, invaded by the laws or acts of the constituted authorities of a State, *should have ample opportunity to obtain redress against such wrongs.*

Such redress can be had from the State Courts, and if they fail to secure to any company or citizen any right guaranteed by the National Constitution, such injustice could be remedied by invoking the jurisdiction of the Supreme Court of the United States.

I am one of those who have lost faith, neither in the Republic nor in the States. I firmly believe that in the interest of all States, and of the welfare of all of the people of our "Commonwealth of Commonwealths," the States and their people are the safest repositories and ultimately the only safe repositories, of power over all persons and corporations within their respective jurisdictions; that the State

tribunals can be trusted to deal uprightly and to decide justly, and that the surest way to ensure justice from the State tribunals and authorities is to repose such trust and confidence in them.

Under the course of procedure now sanctioned by the Federal Courts under the judiciary acts of Congress, a single Judge of some subordinate Court of the United States may tie up a law or solemn act of some legislature or judicial tribunal of a State, in a case in which such Judge first to a limited extent and in a qualified sense prejudges, and then tries, and thus interfere with and control the State in the matter of the regulation of the internal commerce and other domestic affairs of the State.

With the highest respect for the Circuit and District Judges of the United States, and with an affectionate regard for some of them whom it has been my privilege to know personally and well, and with the utmost deference for able and worthy gentlemen who entertain different views, I would venture most earnestly to suggest that if any direct jurisdiction is to be given to the subordinate Federal Courts over the laws and acts of the legislatures and tribunals of the States in the matter of the regulation of the internal commerce of the States, then it should not be by the summary process of injunction.

As the laws of the United States in the premises are now administered, the subordinate Courts of the United States are in effect given power, in a large sense, to regulate and control the internal commerce and other domestic affairs of the States, in particulars and to an extent which was never contemplated by the makers of the American Republic, and which is in conflict with the letter and the spirit of the great instrument of government which our fathers established as the charter of our liberties, and the guaranty of "an indissoluble Union of indestructible States."